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# FEDERALISM DOCTRINES AND ABORTION CASES: A RESPONSE TO PROFESSOR FALLON

ANTHONY J. BELLIA JR.*

## INTRODUCTION

In his Article *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*,[1] Professor Richard Fallon argues that if the Supreme Court were to overrule *Roe v. Wade*,[2] courts might well remain in the "abortion-umpiring business."[3] It is imaginable, he explains—perhaps even likely—that, post-*Roe*, state and federal actors would regulate abortion in ways raising serious constitutional questions. States might attempt to regulate abortions beyond their borders, or Congress might enact a national abortion regulation.[4] Such acts, if they occurred, could give rise to serious constitutional questions of federal and state authority to regulate.[5]

Professor Fallon surely is correct that in a post-*Roe* world state and federal actors might seek to regulate abortion in ways that would raise serious constitutional questions.[6] An important question that follows upon his thesis, however, is the extent to which in analyzing these questions the Court would engage in the same *kind* of constitutional analysis in which it has engaged in *Roe* and its progeny—that is, an analysis balancing a state's interests in protecting life against a pregnant woman's interests in choosing to terminate her pregnancy. In both *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court evaluated the constitutionality of abortion

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1. Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611 (2007).

2. 410 U.S. 113 (1973).

3. Professor Fallon thus responds to Justice Scalia's observation in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that overturning *Roe* would remove the courts from the "abortion-umpiring business." 505 U.S. 833, 996 (1992).

4. *See* Fallon, *supra* note 1, at 613.

5. *Id.*

6. *See id.* at 611–14.

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regulations with reference to standards specifically tailored to account for state and individual interests in the practice of abortion.[7]

The fact, however, that a case involves abortion does not necessarily mean that the Court would resolve it under the kind of balancing standard that it applied in *Roe* and *Casey*. In *Federal Election Commission v. Beaumont*,[8] for example, a nonprofit corporation that urged alternatives to abortion argued that the Federal Election Campaign Act was unconstitutional insofar as it banned corporate contributions in certain federal elections.[9] Though the case related to abortion, the Court resolved it with reference not to competing state and individual interests in the practice of abortion, but to First Amendment principles governing the constitutionality of restrictions on campaign contributions.[10] Thus, in addition to abortion-related cases that the Court has resolved according to standards tailored to account for competing interests in the practice of abortion (what I call "abortion-dependent" standards), there are abortion-related cases that the Court has resolved according to standards that account for interests that are not specific to the practice of abortion (what I call "non-abortion-dependent" standards).

This is not to say that it is easy to classify all abortion-related cases as involving either an abortion-dependent or a non-abortion-dependent standard. There are cases relating to abortion that the Court has *professed* to resolve according to non-abortion-dependent standards but that, it has been argued, the Court *really resolved* according to abortion-dependent standards. In *Madsen v. Women's Health Center*,[11] for instance, the Court had to select the appropriate First Amendment test for analyzing the constitutionality of an injunction against anti-abortion protestors.[12] The Court professed to select the test it did ("the challenged provisions of the injunction [must] burden no more speech than necessary to serve a significant government interest" rather than survive "strict scrutiny") according to a non-abortion-dependent principle, namely that

7. In *Roe*, the Court balanced a state's interest "in protecting potential life" against a woman's interest in having a choice to decide "whether or not to terminate her pregnancy." 410 U.S. at 153–54; *see id.* at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."). In *Casey*, the plurality analyzed the constitutionality of a Pennsylvania statute regulating abortion by balancing "the State's interest in life" and "the right of the woman to terminate the pregnancy." 505 U.S. at 869. The plurality determined that "a law designed to further the State's interest in fetal life" may not impose "an undue burden on the woman's decision before fetal viability." *Id.* at 877. A majority of the Supreme Court applied this "undue burden" test in *Stenberg v. Carhart*, 530 U.S. 914 (2000).

8. 539 U.S. 146 (2003).

9. *Id.* at 149–50.

10. *Id.* at 152–63.

11. 512 U.S. 753 (1994).

12. *Id.* at 757, 764–75.

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the case involved an injunction rather than a generally applicable ordinance.[13] In dissent, Justice Scalia argued that the Court chose to apply the legal test it did because it disapproved of the actions of the protestors in light of the strength it attributed to a woman's interest in procuring an abortion.[14] Quoting Justice O'Connor, Justice Scalia argued that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion."[15] In other words, he argued, disagreements on the Court over the constitutionality of abortion regulations prevented the Court "from evenhandedly applying uncontroversial legal doctrines" to abortion-related cases.[16]

This Essay will assess how, post-*Roe*, the Court might resolve constitutional questions of federal-state authority over abortion-related matters according to abortion-dependent or non-abortion-dependent standards.[17] The constitutional questions I address include those that Professor Fallon has identified in his Article,[18] as well some I independently identify here. Analyzing whether the Court would resolve these questions according to abortion-dependent or non-abortion-dependent standards helps bring into focus how the constitutional landscape might appear were the Court to overturn *Roe v. Wade*. It also permits some preliminary observations concerning the nature of the role the Court has carved out for itself in evaluating questions of state authority in contrast to questions of federal authority.

The Essay proceeds as follows. Part I examines questions of *state* power to regulate abortion in a post-*Roe* world. It explains that the Court (or individual Justices) seemingly would analyze important questions of state power to regulate abortion according to abortion-dependent standards. Part II examines questions of *federal* power to regulate abortion in a post-*Roe* world.

13. *Id.* at 765.

14. *Id.* at 785 (Scalia, J., concurring in part and dissenting in part).

15. *Id.* (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting)).

16. *Madsen*, 512 U.S. at 785 (quoting *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting)).

17. Of course, it is not necessarily the case that the Court as a whole would analyze any particular post-*Roe* constitutional question relating to abortion according to an agreed-upon standard. For some issues, certain Justices might analyze it according to an abortion-dependent standard and others according to a non-abortion-dependent standard. How a Justice selects a standard, however, may depend not on a normative commitment to the relative interests that the practice of abortion implicates, but on a normative commitment to the way in which courts more generally should resolve constitutional questions of the relative power of the federal and state governments.

18. This Essay does not take up all questions that Professor Fallon identifies (which include the authority of states to retrospectively enforce pre-*Roe* regulations of abortion and certain First Amendment issues, see Fallon, *supra* note 1, at 616, 640), but only those concerning the powers of state and federal governments to directly regulate abortion.

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The federal government might regulate abortion directly, as Professor Fallon suggests. Alternatively, if states attempted to regulate abortion beyond their borders, Congress might respond not by prohibiting or allowing abortion, nor by simply leaving the matter to the states and courts to sort out, but by regulating state authority to regulate abortion. That is, Congress might regulate the authority of the states to regulate abortion extraterritorially. This Part identifies the standards by which the Court (or individual Justices) might analyze such questions. It explains that, in contrast to how the Court seemingly would analyze important questions of state power, the Court seemingly would analyze questions of federal power according to non-abortion-dependent standards—that is, standards that do not involve assessing the strength of a state's interest in protecting life or a woman's interest in procuring an abortion.

Part III draws upon the analyses in Parts I and II to suggest a broader perspective on the role that the Court has assumed for itself in evaluating questions of state authority in contrast to questions of federal authority. In analyzing questions implicated here of *state* power to regulate given transactions, the Court has embraced discretionary standards entailing a judicial assessment of state interests in regulating a given subject-matter in a given way. In analyzing questions of *federal* power relative to states, in contrast, the Court has employed standards that implicate interests transcending government interests in particular regulatory outcomes. Thus, regarding questions of *state* authority to regulate abortion, the judicial analysis might turn on the strength of a state's interest in protecting unborn life. Regarding questions of *federal* authority to regulate abortion or regulate how states regulate abortion, judicial analysis might turn on commitments to principles of federalism. Whether, post-*Roe*, then, the Court would remain involved in assessing the strength of state and individual interests in the practice of abortion may well depend on what kind of federal or state regulation emerged in a post-*Roe* world.

## I. STATE POWER TO REGULATE ABORTION

Professor Fallon identifies several questions regarding state power to regulate abortion that could arise if the Court were to overturn *Roe*. These include questions of whether a state law prohibiting citizens from obtaining abortions in other states would violate the Full Faith and Credit or Due Process Clauses, the "negative" implications of the Commerce Clause, or the Privileges and Immunities Clause of Article IV. As this Part explains, the Due Process, Full Faith and Credit, and Dormant Commerce Clause questions implicate competing standards, abortion-dependent and non-abortion-dependent, from which the Justices would have to choose. The Privileges and Immunities

Clause question implicates non-abortion-dependent standards that appear, however, to be particularly susceptible to abortion-dependent refashioning.[19]

### *A. Full Faith and Credit, Due Process, and the "Negative" Commerce Clauses: Competing Standards*

There are at least two questions that, should they arise in a post-*Roe* world, would require the Court to choose between competing standards, abortion-dependent and non-abortion-dependent. Both questions could arise if a state attempted to regulate abortions sought or procured in another state. To borrow Professor Fallon's hypothetical, suppose that State *A* prohibited its citizens from procuring an abortion in another state, or prohibited an out-of-state doctor from performing an abortion on a citizen of State *A*.[20] Such prohibitions could implicate two constitutional questions: (1) What authority does a state have to regulate abortions procured out of state in light of the Due Process and Full Faith and Credit Clauses? (2) What authority does a state have to regulate abortions procured out of state in light of the Commerce Clause?

#### 1. Full Faith and Credit and Due Process

There does not appear to be Supreme Court precedent resolving what authority states have to regulate out-of-state abortions in light of the Due Process[21] and Full Faith and Credit Clauses.[22] This question is essentially a conflict-of-laws one: What authority does a state have under the Constitution to apply its own laws in a case arising out of a particular transaction against a

19. Of course, there is one issue Professor Fallon identifies that could arise relative to state or federal regulation that surely would implicate an abortion-dependent standard: whether a state could constitutionally prohibit abortions necessary to save the life of the mother. *See* Fallon, *supra* note 1, at 625–26. To resolve this question, as Professor Fallon explains, the Court unavoidably would have to engage in balancing of a pregnant woman's interest in her life and state interests in unborn life, a kind of balancing that is the hallmark of the *Roe* and *Casey* analyses. *Id.* at 626.

20. *See id*. at 628.

21. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

22. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . . ."). As Professor Fallon explains, in *Bigelow v. Virginia*, the Supreme Court reversed a Virginia court's conviction of the editor of a Virginia newspaper for printing an advertisement for an abortion service in New York. 421 U.S. 809, 829 (1975). The Court wrote in that case that

> [t]he Virginia legislature could not have regulated the advertiser's activity in New York, and obviously could not have prescribed the activity in that State. Neither could Virginia prevent its residents from traveling to New York to obtain those services, or, as the state conceded, prosecute them for going there.

*Id.* at 822–24 (citations omitted). As Professor Fallon rightly observes, even if this language were not deemed dictum, "the categorical claim that states may never enact or enforce extraterritorial criminal legislation seems too strong." Fallon, *supra* note 1, at 629.

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competing claim that the laws of another state should apply? The Court has taken two approaches to such questions. One is a balancing approach. Under the balancing approach, the question is whether State *A* had "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law [would be] neither arbitrary nor fundamentally unfair."[23] To assess whether a state had sufficient "interests" in regulating out-of-state abortions, the Court presumably would have to assess a state's interests in protecting unborn life conceived in one of its citizens relative to the interests of that citizen in availing herself of the abortion benefits of the laws of another state.[24] In making such an assessment, the Court would be balancing the interests of states seeking to protect unborn life and women seeking abortions that the Court balanced in *Roe* and *Casey*. Accordingly, were the Court to address the question whether a State constitutionally may prohibit it citizens from seeking out-of-state abortions according to an "interest analysis," it likely would be choosing a standard that, in application, would be abortion-dependent.

It is not certain, however, that the Court would resolve the question of state constitutional authority under the Due Process and Full Faith and Credit Clauses to regulate out-of-state abortions according to an "interest analysis." The Court (or individual Justices) might invoke a more categorical rule based on historical practice. In *Sun Oil Co. v. Wortman*,[25] the Court had to resolve whether a forum state could apply its own statute of limitations to claims that in substance the law of another state must govern.[26] Rather than engage in an interest analysis, the Court held that under "long established and still subsisting choice-of-law practices," statutes of limitation are procedural and thus within the legislative competence of a forum state to apply as governing law in cases brought within its jurisdiction.[27] Accordingly, the Court concluded, under the Full Faith and Credit and Due Process Clauses, a state categorically may apply its own statute of limitations in cases brought before its own courts.

If long established choice-of-law practices can operate to define the legislative competence of a state, there is an argument to be made that a state generally has legislative competence to regulate the activities of its citizens, in-state or out-of-state—in some circumstances by criminal sanction. Certain early nineteenth century accounts of the law of nations recognized a sovereign prerogative in states to regulate their citizens no matter where they were. As Joseph Story explained in his famous treatise on the conflict of laws:

23. Phillips Petrol. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (plurality opinion)).

24. *See* Fallon, *supra* note 1, at 629–30.

25. 486 U.S. 717 (1988).

26. *Id.* at 719.

27. *Id.* at 722–30.

> [N]ations generally assert a claim to regulate the rights, duties, obligations, and acts of their own citizens, wherever they may be domiciled. And, so far as these rights, duties, obligations, and acts afterwards come under the cognizance of the tribunals of the sovereign power of their own country, either for enforcement, or for protection, or for remedy, there may be no just ground to exclude this claim.[28]

Thus, according to Story, "every nation has a right to bind its own subjects by its own laws in every other place."[29]

Some nineteenth century courts suggested that this principle applied to certain criminal regulations. In 1819, in *Commonwealth v. Gaines*,[30] the General Court of Virginia explained that "the Law of Nations recognizes the right of a State to punish its own citizens for the commission of crimes either of *lesae majestatis*, or of other dangerous and injurious tendencies, out of its own territorial limits."[31] Moreover, the court explained, in England "it is not thought absurd, nor has it been unusual to enact Statutes by which their subjects are punished for offences committed out of the Realm."[32] In 1863, in *Chandler v. Main*,[33] the Supreme Court of Wisconsin explained that "it seems to be well established, that every nation has the right to punish its own citizens for the violation of its laws, wherever committed."[34]

Other writers suggested that a state only had jurisdiction to punish citizens for acts committed abroad when the offense was particularly injurious to the state. In *People v. Tyler*,[35] Judge Isaac Christiancy of the Supreme Court of Michigan explained that "every sovereignty has the right, subject to certain restrictions, to protect itself from, and to punish as crimes, certain acts which are particularly injurious to its rights or interests, or those of its citizens, *wherever committed*."[36] Thus, he explained:

> without attempting to enumerate all, the citizen may commit treason by acts or combinations abroad; the commerce of a nation may be injured, or its pacific relations with other governments endangered, by the criminal conduct of the

28. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 451 (Boston, Hilliard, Gray & Co. 1834).

29. *Id.* at 22.

30. 4 Va. (2 Va. Cas.) 172 (1819).

31. *Id.* at 176.

32. *Id.*

33. 16 Wis. 398 (1863).

34. *Id.* at 419.

35. 7 Mich. 161 (1859).

36. *Id.* at 221 (Christiancy, J., concurring).

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> crews or passengers of its ships in foreign ports. In such cases the offender may be punished by the government of which he is a citizen . . . .[37]

In his famous treatise on the conflict of laws, Francis Wharton asserted that a state may apply its criminal laws to certain offenses committed by its citizens extraterritorially—offenses committed on the high seas, political offenses, forgery, and homicides.[38] In 1941, in *Skiriotes v. Florida*,[39] the Supreme Court upheld state authority to criminally regulate the conduct of a citizen extraterritorially under one of these categories—offenses committed on the high seas.[40] In *Skiriotes*, the Court explained that "a criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country."[41] Likewise, the Court explained, "[i]f the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which *the State has a legitimate interest*."[42] Citing *Skiriotes*, a Comment in the Restatement (Second) of Conflict of Laws explains that "[a]n individual State of the United States . . . has jurisdiction to apply its local law *in certain instances* to its absent citizens."[43]

If the Court were to identify a historical practice recognizing state authority to apply criminal laws extraterritorially to citizens, it could hold that a state may prohibit its citizens from seeking abortions in other states without assessing the strength of the state's interest in the prohibition. This holding would reflect a non-abortion-dependent principle—that a state may apply its criminal laws extraterritorially. If, rather, the Court were to identify only a narrower historical understanding—that states may apply criminal laws extraterritorially to citizens only when they have a demonstrable "legitimate interest" in doing so or when the regulated conduct is "particularly injurious" to the state—the Court might have to assess the strength of the state's interest (historically understood or absolutely) in prohibiting its citizens from seeking

37. *Id.* at 221–22.

38. FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW, INCLUDING A COMPARATIVE VIEW OF ANGLO-AMERICAN, ROMAN, GERMAN, AND FRENCH JURISPRUDENCE §§ 858–75 (Phil., Kay & Brother 1872).

39. 313 U.S. 69 (1941).

40. *Id.* at 77.

41. *Id.* at 73–74.

42. *Id.* at 77 (emphasis added).

43. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 9, cmt. F (1971) (emphasis added). In light of the history of this precedent, it has been argued that *Bigelow* is the only Supreme Court "decision calling into question the extraterritorial authority of states over citizens." Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 907 n.94 (1988) (citing Bigelow v. Virginia, 421 U.S. 809 (1975)).

abortions in other states. This assessment could constitute an abortion-dependent inquiry into the sufficiency of a state's interest in prohibiting its citizens from obtaining abortions in other states.

2. Dormant Commerce Clause

A second question regarding a state's power to regulate activities that occur extraterritorially is whether the Commerce Clause[44] imposes any limitations upon its ability to do so. The Court has held that the Commerce Clause not only authorizes congressional regulation of commerce, but also, by "negative" implication, precludes certain forms of state regulation affecting commerce. There are two strands to the Court's so-called "negative" Commerce Clause jurisprudence. First, the Court has held that the Commerce Clause prohibits "state regulations that unjustifiably discriminate on their face against out-of-state entities."[45] Moreover, the Court has held that the Commerce Clause may, under a balancing test, preclude state regulations that do not discriminate facially against out-of-state entities. In *Pike v. Bruce Church*,[46] the Court explained that if a state law "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[47] "[T]he extent of the burden that will be tolerated," the Court explained, will "depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[48]

A state law prohibiting citizens from procuring abortions in state or out of state would not seem to discriminate against out-of-state citizens. Accordingly, the issue for the Court would be whether a state law prohibiting a citizen from procuring an out-of-state abortion imposed an excessive burden on commerce relative to the state's interest in the regulation. In applying this test to a state law prohibiting citizens from procuring out-of-state abortions, the Court would have to assess the "legitimacy" and "nature" of a state's interest in protecting unborn life relative to the burden that the prohibition would impose on interstate commerce. Professor Fallon observes that, in applying this test, a court would have to assess a state's interest in protecting unborn life in apparently the same way it has assessed it under the frameworks of *Roe* and *Casey*.[49] Rather than assess whether the burden a state imposed on *an*

44. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

45. Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Com'n, 545 U.S. 429, 433 (2005) (citing City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)).

46. 397 U.S. 137 (1970).

47. *Id.* at 142.

48. *Id.*

49. Fallon, *supra* note 1, at 637.

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*individual's interest in an abortion* was "undue," as courts do under *Casey*,[50] the Court would assess whether the burden on *commerce* was "undue." The analysis would be abortion-dependent insofar as the Court would have to assess whether the "burden" on commerce was justified relative to a state's interest in protecting unborn life.

It is worth noting that two Justices have categorically rejected this balancing test as a means of giving effect to the Commerce Clause. Justices Scalia and Thomas have argued that "[t]he historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce."[51] In other words, they believe that the Commerce Clause does not operate to negative state laws of its own force. On grounds of stare decisis, they would "enforce a self-executing 'negative' Commerce Clause . . . against a state law that facially discriminates against interstate commerce";[52] they would not, however, invoke the *Pike* balancing test in situations to which the Court has yet to apply it. Under their view, a state categorically would not violate the Commerce Clause by prohibiting its citizens from procuring out-of-state abortions. There would be no need for the Court to assess a state's interest in protecting unborn life to uphold the regulation. Thus, they would analyze the "negative" Commerce Clause issue according to a non-abortion-dependent standard, whereas other Justices seemingly would analyze it according to an abortion-dependent standard.

### *B. Privileges and Immunities Clause of Article IV: Non-Abortion-Dependent Standards Susceptible to Abortion-Dependent Refashioning*

The preceding section deemed certain standards abortion-dependent because, in applying them to determine state authority to regulate abortion extraterritorially, the Court would have to assess the strength of a state's interest in protecting unborn life. It deemed other standards non-abortion-dependent because, in applying them to determine state authority to regulate abortion, the Court would strain credulity to self-consciously assess a state's interest in unborn life or a woman's interest in an abortion: these standards by their terms serve interests not specific to the practice of abortion. That said, certain issues of state power to regulate abortion that could arise post-*Roe*

50. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

51. W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 209 (1994) (Scalia, J., concurring) (quoting Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part)). Justice Thomas joined Justice Scalia's concurring opinion.

52. *Id.* at 210.

implicate standards that appear by their terms to be non-abortion-dependent but that are sufficiently ill-defined as to be particularly susceptible to abortion-dependent refashioning.

The question whether the Privileges and Immunities Clause of Article IV[53] prevents a state from prohibiting its citizens from procuring out-of-state abortions implicates such a standard. As Professor Fallon describes, scholars have asserted two competing visions of the operation of the Privileges and Immunities Clause in this context.[54] Professor Mark Rosen has argued that the Privileges and Immunities Clause precludes a state from imposing discriminatory burdens on citizens of other states; it does not prohibit a state from regulating the out-of-state activities of its own citizens.[55] Under this rule, the Privileges and Immunities Clause categorically would not preclude a state from prohibiting its citizens from seeking out-of-state abortions. There would be no need for a court, in reaching this conclusion, to balance a citizen's interest in obtaining an abortion against the state's interest in protecting unborn life. Accordingly, application of the rule would not be abortion-dependent.

Contrariwise, Professor Seth Kreimer has argued that under the Privileges and Immunities Clause, a citizen of State *A* who visits State *B* is "'entitled' to local privileges and immunities" of State *B*.[56] In other words, when a non-Californian enters California, that person has a "right as a citizen of the United States to be treated with the same respect shown to native Californians."[57] On its face, this theory of the Privileges and Immunities Clause appears to be non-abortion-dependent. If a visiting non-citizen is entitled to *all* benefits that a state affords its citizens, the non-citizen would be entitled to procure an abortion not because it is an abortion, but because it is something to which citizens are entitled.

Even if Professor Kreimer's theory is generally correct, the principle it asserts cannot be "absolute."[58] First, the Court has explained that "[o]nly with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the state treat all citizens, resident and nonresident, equally."[59] Moreover, the Court has explained that a state may have a "substantial reason" for discriminating against citizens of other states,

53. U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.").

54. Fallon, *supra* note 1, at 633–35.

55. Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 897–903 (2002).

56. Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 919 (1993).

57. *Id.* at 917.

58. *See* Saenz v. Roe, 526 U.S. 489, 502 (1999) (explaining that the protections of the Privileges and Immunities Clause of Article IV are not "absolute").

59. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 383 (1978).

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for example, for requiring them to pay more for a hunting license,[60] to enroll in a state university,[61] or to vote or hold elective public office.[62] If a court were to accept Professor Kreimer's view but account for these principles, it would have to assess whether the benefit of procuring an abortion in State *B* was the kind of benefit to which the Privileges and Immunities Clause entitles a citizen of State *A* when in State *B*.[63] In making this determination, a court might normatively assess the value of the benefit of being able to procure an abortion, the assessment that lies at the heart of *Roe* and *Casey*. Accordingly, Professor Kreimer's theory of the Privileges and Immunities Clause of Article IV sets up a standard that appears in formulation to be non-abortion-dependent but that in application might prove actually to be abortion-dependent.

### *C. Summary*

The foregoing analysis demonstrates that there is no question of state power to regulate abortion extraterritorially that the Court, without question, would resolve under a non-abortion-dependent standard. To state it affirmatively, it is possible, if not likely, that the Court would address most questions of state authority to regulate abortion examined here under abortion-dependent standards. The Court might resolve state authority under the Full Faith and Credit and Due Process Clauses to prohibit citizens from obtaining out-of-state abortions by assessing the strength of state interests under the *Allstate* interest analysis. If the Court were to pursue whether, under traditional choice-of-law principles, it was understood that states could criminally regulate citizens' out-of-state conduct, it might categorically recognize a power to so regulate. But it might also discover a tradition under which courts assessed whether a state had a "legitimate interest" in making such a criminal regulation. Moreover, in a "negative" Commerce Clause analysis, the Court likely would assess the nature of a state's interest in regulating abortions occurring beyond its borders. Finally, certain standards that the Court might invoke under the Privileges and Immunities Clause, though appearing non-abortion-dependent as formulated, could prove abortion-dependent in application.

## II. FEDERAL POWER TO REGULATE ABORTION

Professor Fallon also identifies questions regarding federal power to regulate abortion that could arise if the Court were to overturn *Roe*. Specifically, he identifies questions that would arise were Congress to directly

60. *Saenz*, 526 U.S. at 502 (citing *Baldwin*, 436 U.S. at 390–91).

61. *Id.* (citing Vlandis v. Kline, 412 U.S. 441, 445 (1973)).

62. *Baldwin*, 436 U.S. at 383.

63. *See supra* notes 56–57 and accompanying text.

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prohibit or protect the practice of abortion.[64] In addition to the issues that Professor Fallon identifies, it is worth considering others. In controversial areas such as gay marriage and tort reform, certain federal initiatives have taken the form not of direct regulation of individuals, but of regulation of state authority to regulate individuals. If states were to regulate abortion extraterritorially, Congress might respond by defining what aspects of abortion a state may permissibly regulate. Were Congress to prohibit or permit extraterritorial state regulation of abortion, a host of constitutional questions would arise regarding congressional power to do so.

As this Part explains, the Court likely would invoke non-abortion-dependent standards to resolve most questions of *federal* power to regulate the practice (or to regulate states' regulation of the practice) of abortion.

### *A. Federal Regulation of the Practice of Abortion: A Non-Abortion-Dependent Standard*

Professor Fallon argues that under the Commerce Clause congressional power to regulate abortions seems plain: "Abortions are services sold in interstate commerce, and the business of providing medical care, including abortions, is intertwined with commerce in innumerable ways."[65] In *Gonzales v. Raich*,[66] the Supreme Court explained that its "case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[67] Even abortions performed on a non-commercial basis would seem, as Professor Fallon explains, to be part of a class of activities—abortions generally—for which there is an interstate market.[68]

It has been argued that the Court's Commerce Clause standards are sufficiently malleable that judges may apply them to reach politically desired results.[69] Regardless of whether this is true, the "substantial effects" test, by its terms, is non-abortion-dependent. The test concerns the relation of an activity to "commerce," not the interest of a state in regulating an activity relative to the interests of an individual to be free from such regulation. As Professor

64. Fallon, *supra* note 1, at 621–25.

65. *Id.* at 622–23.

66. 545 U.S. 1 (2005).

67. *Id*. at 17.

68. Fallon, *supra* note 1, at 623; *cf.* Robert J. Pushaw, *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319 (2005) (arguing that the Court should sustain the Partial-Birth Abortion Ban Act "because the performance of partial-birth abortions is 'commerce'—the sale of a service in the market—that has demonstrable effects 'among the states'").

69. *See, e.g.*, Pushaw, *supra* note 68, at 319 ("[T]he Supreme Court's current Commerce Clause standards . . . are malleable and therefore tend to be applied in light of each judge's politics and ideology.").

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Fallon observes, a judge who was not prepared to accept the results of applying the substantial effects test in the context of abortion because the context was abortion (and who was committed to making an honest account of his or her reasons for action) would have "to redefine and limit Congress's commerce power" itself,[70] or rely on another constitutional provision as limiting congressional power.[71]

It is not clear, however, whether, if *Roe* were overturned, any of the Justices would be inclined to refashion the commerce power based on normative commitments regarding abortion. In *Raich*, for instance, certain Justices expressly subjugated normative commitments to policies underlying the regulations at issue to commitments regarding the federal-state balance of power. Justice Stevens, writing for a majority, described a federal prohibition on the use of homegrown marijuana for medicinal purposes as "troubling."[72] Nonetheless, based on a normative commitment to the degree of federal power he understands Congress to have under the Constitution, Justice Stevens wrote for the Court to uphold the federal prohibition.[73] In dissent, Justice O'Connor made clear that she did not find a prohibition on the use of marijuana for medical purposes troubling: "If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act."[74] Nonetheless, she voted to hold the federal prohibition on the use of intrastate marijuana for medicinal purposes unconstitutional.[75] Rather than effectuate a commitment in favor of the substance of the federal regulation, she would have effectuated a commitment to limitations on federal authority to regulate. In particular, she described a normative commitment to "[o]ne of federalism's chief virtues"—"that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"[76] Accordingly, she resolved that "whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case."[77]

70. Fallon, *supra* note 1, at 624.

71. *Id*.

72. 545 U.S. at 9.

73. *See id*. ("The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case.").

74. *Id*. at 57 (O'Connor, J., dissenting).

75. *Id*.

76. *Id*. at 42 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

77. *Raich*, 545 U.S. at 57 (O'Connor, J., dissenting).

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The point of this is simply that the standard by which the Court would resolve whether Congress has commerce power to regulate the practice of abortion would seemingly be a non-abortion-dependent one. The "substantial effects" test in terms does not lend itself to weighing a state's interest in protecting unborn life against a woman's interest in procuring an abortion. It is not entirely clear, either, that a Justice otherwise disposed to refashion a legal test to fit a desired result relating to the practice of abortion would in fact so refashion the commerce power; there are potentially competing normative commitments to federalism that might predominate.

### *B. Federal Regulation of States' Regulation of Abortion: Non-Abortion-Dependent Standards, Generally*

It is conceivable that if Congress chose in a post-*Roe* world to regulate abortion, it would not regulate abortion directly, but rather would regulate the states' authority to regulate abortion. Since Professor Fallon does not address the possibility of such measures, I will analyze them here in more detail than I have analyzed other measures.

In two famous situations of perceived "overregulation" by states, Congress has responded (or been urged to respond) not by preempting state regulation with a federal standard but by defining the limits of state authority. The first is gay marriage. When Hawaii became the first state to recognize gay marriage, the question arose whether the Full Faith and Credit Clause[78] would require other states to recognize all gay marriages that Hawaii recognized. To the extent that the issue called for a national resolution, Congress did not provide that gay marriage shall or shall not be a national institution. Rather, Congress provided in the Defense of Marriage Act that one state need not recognize a gay marriage that is recognized under the laws of another state.[79] In effect, Congress provided that a state has no authority to act in such a way as to legally require another state to recognize a marriage between persons of the same sex.

A second situation of perceived "overregulation" by the states is state court jurisdiction in tort law cases. State courts have broad-based jurisdiction over out-of-state business entities that have certain "minimum contacts" with the jurisdiction. A perceived problem is that in certain instances plaintiffs forum-

78. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state . . . .").

79. Specifically, the Act provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (2000).

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shop for jurisdictions that have "plaintiff friendly" laws or juries. Opponents of such forum-shopping and large recoveries in tort cases advocate "tort reform." Tort reform could entail Congress enacting uniform national standards governing liability in personal injury, products liability, and medical malpractice cases. Proposals for tort reform tend more, however, toward limiting the jurisdiction of state courts in tort cases or providing procedures by which state courts must adjudicate tort cases. For example, the Product Liability Reform Act of 1998 would have regulated statutes of limitations and repose in certain categories of state court litigation.[80] The Lawsuit Abuse Reduction Act of 2004,[81] which passed the House of Representatives in 2004 and was reintroduced the following year,[82] would have limited the jurisdiction that state courts may exercise in personal injury cases. Specifically, it would have required a tightened connection between, on the one hand, a state and, on the other, the parties or the transaction underlying the plaintiff's claim, for a state court to exercise jurisdiction in personal injury cases.[83] In effect, these measures would not provide a federal standard governing tort actions; rather, they would limit a state's authority to adjudicate tort cases.

If states were to regulate abortion extraterritorially post-*Roe*, and the conflict-of-laws issues this created were thought to warrant a national solution, Congress might attempt to define the regulatory authority of states over abortion rather than regulate abortion itself. Congress could do this in two ways: it could provide (1) a choice-of-law rule or (2) a choice-of-forum rule. Were Congress to provide either kind of rule, constitutional questions of congressional power would arise, implicating competing standards among which the Justices would have to choose.

1. Choice-of-Law Regulation

Through a choice-of-law provision, Congress could favor the laws of a state in the territory of which an abortion occurred, or the laws of a state of which a person procuring an abortion was a citizen. To favor territorial regulation, Congress could provide: "In any civil or criminal action arising from or relating to an abortion, the laws of the State in which the abortion occurs shall provide the rule of decision unless the Constitution, laws or treaties of the United States shall otherwise require or provide." To favor regulation of citizens, Congress could substitute "of which the person seeking the abortion is a citizen" for "in which the abortion occurs." If Congress had power to enact such regulations, its power would likely derive from the Full Faith and Credit Clause of Article IV: "Full Faith and Credit shall be given in

80. S. 2236, 105th Cong. §§ 106, 107 (1998).
81. H.R. 4571, 108th Cong. (2004).
82. H.R. 420, 109th Cong. (2005).
83. *Id.* § 4(a).

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each State to the public Acts, Records, and judicial Proceedings of every other State; *And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*"[84] Congressional power would derive from the highlighted portion, namely the Effects Clause.

A congressional statute mandating that either the law of the state in which an abortion occurred or the law of the state of which the person procuring an abortion was a citizen shall govern would restrict states from exercising powers that states traditionally have exercised. As explained, states traditionally have been understood to have authority to regulate the activities of citizens, even to regulate certain activities that occur extraterritorially.[85] And there is unquestionably an established tradition of state constitutional authority to regulate activities occurring within the territory of the state.[86]

The relationship between state power to regulate matters that states traditionally have regulated and congressional power to limit that power under the Effects Clause is unsettled. In *Sun Oil Co. v. Wortman*,[87] the Court held that a state had constitutional power to apply its own statute of limitations to claims that in substance the laws of another state had to govern.[88] The Court premised this holding on "long established and still subsisting choice-of-law practices."[89] That those practices may "come to be thought . . . unwise," the Court explained, does not mean that they "thereby become unconstitutional."[90] The Court proceeded to observe that if it becomes "desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect," or "*it can be proposed* that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause."[91] It is revealing that here the Court confidently declared that States can adopt a rule that they will apply the statutes of limitations of other states, but less confidently declared that "*it can be proposed*" that Congress require states to apply other states' statutes of limitations. The Court may have been reluctant to declare simply that "Congress may legislate to that

84. U.S. CONST. art. IV, § 1 (emphasis added).

85. *See supra* notes 28–43 and accompanying text.

86. *See generally* STORY, *supra* note 28, at 19 (The first and most general maxim or proposition [of International Jurisprudence] is that . . . every nation possesses an exclusive sovereignty and jurisdiction within its own territory.").

87. 486 U.S. 717 (1988).

88. *Id.* at 729

89. *Id*. at 728; *see id*. at 726 (explaining that "[t]he historical record shows conclusively, we think, that the society which adopted the Constitution did not regard statutes of limitations as substantive provisions, akin to the rules governing the validity and effect of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts").

90. *Id*. at 728–29.

91. *Id*. at 729 (emphasis added).

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effect" because the Court has never settled any substantial definition of congressional power under the Effects Clause.[92]

Scholars have offered various theories of what power Congress has to require a state to enforce the laws of another rather than its own under the Effects Clause. These theories are generally non-abortion-dependent insofar as each would define congressional power under the Effects Clause relative to abortion regulation without performing a *Roe*-type consideration of competing interests.

Professor Mark Rosen has usefully divided these theories into two categories. The first category includes "Congressional Supremacy" theories.[93] "Proponents of this approach view Congress's plenary power as encompassing both expansion and contraction of effect that a forum must give to another state's acts or judgments."[94] Under this theory, Congress's authority to prescribe a choice-of-law rule for the States is plenary and thus, in a post-*Roe* world, would not depend on balancing interests relative to the practice of abortion. The second category includes "Interstitial Power" theories.[95] Under these theories, "Congress has power to legislate only with respect to matters about which the Supreme Court has not provided a full faith and credit rule."[96] There are two variations of these theories: (1) that Congress may enforce the self-executing requirements of the Full Faith and Credit Clause where judicial enforcement is insufficient; or (2) that Congress may require one state to give more respect to the acts and judgments of another state than the Full Faith and Credit Clause requires, but not less.[97] Under neither variation would the Court have to engage in a balancing of state and individual interests relative to abortion to determine the scope of congressional power. Once the Court identified the baseline of what the Full Faith and Credit Clause requires (an exercise that could be abortion-dependent under an interest analysis, as explained in the last Part),[98] the question for the Court would be (1) whether Congress was enforcing those requirements, no more and no less, or (2)

92. Congress has enacted legislation under the Effects Clause only five times, and the Supreme Court has never considered a constitutional challenge on Effects Clause grounds. Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional:* Lawrence*, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 965 & n.187 (2006) (explaining that Congress has legislated under the Effects Clause only five times, describing those enactments, and observing that the enactments have not been challenged in the Supreme Court on Effects Clause grounds). Accordingly, the Court has not had occasion to meaningfully expound upon congressional power under the Effects Clause.

93. *Id.* at 958.

94. *Id*. (internal quotation marks omitted).

95. *Id.* at 959.

96. *Id*.

97. *Rosen, supra* note 92, at 959.

98. *See supra* notes 23–43 and accompanying text.

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whether Congress was requiring a state to give more faith and credit, but not less.

Professor Rosen himself has offered a two-step approach to questions of congressional power under the Effects Clause. Under his approach, courts first should apply a "clear statement rule" to ensure that Congress has considered interests of state autonomy and national unity "in the context in which the statute is being applied."[99] Second, Professor Rosen argues that courts should assess whether the rule Congress has enacted under the Effects Clause "is reasonable, taking into account the Full Faith and Credit Clause's twin goals of creating a union and meaningfully empowering states."[100] Insofar as he describes this inquiry as "intrinsically open ended,"[101] it is possible that, under the standard he proposes, a state's interest in regulating abortion and a woman's interest in procuring an abortion could figure in the analysis. With this exception, however, scholars have framed most theories of congressional power under the Effects Clause in terms that would not lend themselves in application to express consideration of the competing interests that underlie the Court's analyses in *Roe* and *Casey*.

2. Choice-of-Forum Regulation

Another way for Congress to regulate the states' regulation of abortion would be to enact a choice-of-forum provision. Through a choice-of-forum provision, Congress could control the law governing certain abortion disputes. If, for example, State *A* were to criminally prohibit its citizens from procuring abortions within or without State *A*, and State *B* were to allow any person present in State *B* to legally procure an abortion, Congress could resolve this conflict of laws by prescribing the forum in which criminal prosecutions relating to abortion must be brought. If Congress wanted to favor the territorial interests of a state, it might provide: "Any action against a person for procuring or providing an abortion may be brought only in the courts of the State in which the alleged abortion giving rise to the action was procured or provided." By requiring the action to be brought in the state in which the abortion was performed, the Court would exclude the courts of another state from trying to enforce a contrary regulation. If Congress wanted to favor the interests of a state in regulating its citizens, it might provide: "Any action against a person for procuring or providing an abortion may be brought only in the courts of the State of which the person procuring the abortion giving rise to the action is a citizen." By requiring the action to be brought in the state of which the person procuring an abortion was a citizen, the Court would exclude the courts of another state from trying to enforce a contrary regulation.

99. Rosen, *supra* note 92, at 977.
100. *Id.* at 978.
101. *Id.*

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If Congress constitutionally may enact such regulation, the source of its power likely would be the Commerce Clause.[102] The Lawsuit Abuse Reduction Act of 2005 (LARA), for example—a measure designed to regulate the jurisdiction of state courts over tort claims—was introduced in Congress as a regulation of interstate commerce.[103] If Congress enacted a statute regulating state court jurisdiction over state law actions, the statute would generate difficult questions of congressional power.

The first set of questions would relate to whether a federal regulation of state court jurisdiction would be a regulation of "commerce" under the Commerce Clause. The Supreme Court explained in *Gonzales v. Raich*[104] that its "case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[105] One question that would arise under this test is whether a federal law regulating state court jurisdiction qualifies as a regulation of "economic" or "commercial" activity.[106] In *United States v. Morrison*,[107] the Court held that Congress exceeded its powers under the Commerce Clause when it enacted the Violence Against Women Act of 1994 in part because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[108] The Court maintained this element of the Commerce Clause inquiry in *Raich*, finding that the class of regulated activities under the Controlled Substances Act, unlike gender-motivated violence, was "quintessentially economic."[109]

Accordingly, were Congress to regulate the state fora in which abortion cases could be brought, the Court would have to resolve what constituted the regulated activity and whether it was itself "economic," or part of a larger class

102. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

103. The House Report on the Act explained:

> Congress unquestionably has the authority to regulate economic activities that "affect" interstate commerce, and forum shopping clearly has a substantial affect on interstate commerce by allowing opportunities for personal injury lawyers to exploit lax venue and forum non conveniens rules to pick and choose those courts with a reputation for consistently awarding near-limitless awards. Section 4 of the Lawsuit Abuse Reduction Act clearly applies to economic activities, as the definition of "personal injury claim" is a claim "to recover" for a person's personal injury. Such a provision is entirely consistent with federalism principles.

H.R. REP. NO. 109–123, at 35 (2005).

104. 545 U.S. 1 (2005).

105. *Id.* at 17.

106. *See generally* Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001) (analyzing this question).

107. 529 U.S. 598 (2000).

108. *Id.* at 613.

109. *Raich*, 545 U.S. at 25.

of "economic" activities that the statute regulated. The House Report on LARA deemed the regulated activity to be not the jurisdiction of state courts but the "recovery" that a personal injury claim allows—an economic activity.[110] Assuming that this was a permissible characterization of the regulated activity in the tort context, it is not clear that Congress could likewise deem the "liability" a criminal law imposes an "economic" activity. The question, in any event, whether a federal choice-of-forum law in abortion cases regulated an "economic" activity would not be abortion-dependent in concept: to answer it, courts would analyze whether criminal liability for an abortion-related activity was an economic activity, not balance a state's interest in protecting unborn life against an individual's interest in terminating a pregnancy.

Even if the Court determined that a federal choice-of-forum clause qualified as a regulation of "economic" activity, it might have to address whether such a regulation was "proper" in light of principles of state sovereignty that the Court has recognized. The Supreme Court has repeatedly suggested that there are limits on Congress's power to regulate the jurisdiction of state courts. In 1912, in *Mondou v. New York, New Haven, & Hartford Railroad Co.*,[111] the Court held that state courts must enforce actions arising under the Federal Employers' Liability Act (FELA),[112] but specifically noted that Congress had not attempted in FELA "to enlarge or regulate the jurisdiction of state courts."[113] In 1947, in *Testa v. Katt*,[114] the Court held that a state court must enforce a federal action if it has "jurisdiction adequate and appropriate under established local law to adjudicate [the] action."[115] More recently, in 1999 in *Alden v. Maine*,[116] the Court explained that Congress generally "may require state courts of adequate and appropriate jurisdiction to enforce federal prescriptions."[117] Finally, in 2003, in *Jinks v. Richland Co.*,[118] the Court expressly reserved the question whether Congress generally has power to regulate practice and procedure in state courts in state law cases.[119] Each of these cases at least suggests that there may be a domain of state authority over state courts that is off-limits to federal regulation.

110. *See* H.R. REP. NO. 109–123, at 35 (2005).

111. 223 U.S. 1 (1912).

112. *Id.* at 59.

113. *Id*. at 56; *see also* Claflin v. Houseman, 93 U.S. 130, 137 (1876) (explaining that federal rights of action are enforceable in state court, so long as the state court is "competent to decide rights of the like character and class").

114. 330 U.S. 386 (1947).

115. *Id*. at 394.

116. 527 U.S. 706 (1999).

117. *Id*. at 752 (internal quotation marks and citations omitted).

118. 538 U.S. 456 (2003).

119. *Id*. at 464–65.

It is worth pausing for a moment on *Jinks*. In *Jinks*, the Court addressed whether Congress had authority to provide for the tolling of state statutes of limitations in 28 U.S.C. § 1367. Section 1367 gives federal district courts "supplemental jurisdiction" over certain state law claims. It tolls the statute of limitations on state law claims brought within a district court's supplemental jurisdiction but over which the district court ultimately declines to exercise supplemental jurisdiction.[120] The respondents argued in *Jinks* that the tolling provision was "not a 'proper' exercise of Congress's Article I powers [to regulate the jurisdiction of the federal courts] because it violates principles of state sovereignty" insofar as Congress lacks authority to regulate state court "procedure" in state law cases.[121] (In *Printz v. United States*,[122] the Court had explained that, under the Necessary and Proper Clause,[123] "[w]hen a [l]aw for carrying into Execution the Commerce Clause violates the principle of state sovereignty reflected in . . . various constitutional provisions . . . , it is not a [l]aw proper for carrying into Execution the Commerce Clause."[124]) In *Jinks*, the Court rejected the argument that the tolling provision was not a "proper" regulation on the ground that a statute of limitations was "substantive," not "procedural," to the extent the distinction is meaningful in this context.[125]

The *Jinks* analysis helps frame constitutional questions of state sovereignty that the Court could face if Congress were to regulate the jurisdiction of state courts in abortion cases. In determining whether a regulation of commerce is "proper" in light of principles of state sovereignty, the Court has employed three paradigms in recent years: (1) non-interference with "traditional state functions," (2) anti-commandeering, and (3) non-interference with incidents of state sovereignty evidenced by principles of English law or the law of nations. In *Garcia v. San Antonio Metropolitan Transit Authority*,[126] the Court rejected the "traditional governmental functions" paradigm as an independent limit on federal authority;[127] accordingly, only the last two paradigms warrant examination here.

In *New York v. United States*, the Court held that Congress may not "commandeer" a state legislature to enact a federal regulatory program.[128] In *Printz v. United States*, the Court held that Congress may not "commandeer"

120. 28 U.S.C. § 1367(d) (2000).

121. *Jinks*, 538 U.S. at 464.

122. 521 U.S. 898 (1997).

123. U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .").

124. *Printz*, 521 U.S. at 923–24 (internal quotation marks and citations omitted).

125. *Jinks*, 538 U.S. at 464–65.

126. 469 U.S. 528 (1985).

127. *Id.* at 530–31 (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

128. 505 U.S. 144, 202 (1992).

state executive officials to enforce a federal regulatory program.[129] In both cases, the Court was careful to explain that Congress does not unconstitutionally commandeer state courts when it requires them to enforce federal law. In *New York*, the Court explained that "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."[130] In *Printz*, the Court explained that the Constitution does "permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."[131] Neither *New York* nor *Printz* addressed, however, the power of Congress to regulate the procedure or jurisdiction of state courts. In *Reno v. Condon*,[132] the Court explained *New York* and *Printz* as prohibiting Congress from "seek[ing] to control or influence the manner in which States regulate private parties" but allowing Congress to regulate individual or "state activities."[133] If Congress prescribed the state forum in which an abortion case must be brought, the Court might have to address whether this prescription constituted, on the one hand, a regulation of individual or state activities, or, on the other hand, a regulation of the manner in which states regulate private parties.[134] The answer to this question would not appear to be abortion-dependent, but rather dependent upon overarching commitments to a federal-state balance of power.

The Court also could analyze the question of congressional authority to regulate state court jurisdiction in the way that it has analyzed questions of state sovereign immunity: by examining whether such a regulation would interfere with an incident of state sovereignty that the common law or law of nations recognized at the time of the Founding. In *Seminole Tribe of Florida v. Florida*,[135] the Court explained that state sovereign immunity has its roots "not solely in the common law of England, but in the much more fundamental 'jurisprudence in all civilized nations.'"[136] Participants in ratification debates, members of the first Congresses, and state court judges during the Founding era and subsequent decades largely premised arguments about congressional

129. *Printz*, 521 U.S. at 935.

130. *New York*, 505 U.S. at 178–79.

131. *Printz*, 521 U.S. at 907.

132. 528 U.S. 141 (2000).

133. *Id*. at 150 (quoting South Carolina v. Baker, 485 U.S. 505, 514–15 (1988)).

134. *See* Bellia, *supra* note 106, at 970–92 (analyzing state sovereignty issues, including anti-commandeering issues, that the Court might face if Congress were to regulate state court procedures).

135. 517 U.S. 44 (1996).

136. *Id*. at 69 (quoting Hans v. Louisiana, 134 U.S. 1, 17 (1890)) (citations omitted). In *Alden v. Maine*, the Court rooted sovereign immunity more in English law than the law of nations. 527 U.S. 706, 715–16 (1999).

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power over state court jurisdiction on principles of sovereignty derived from the law of nations.[137] Most notably, they premised arguments about whether Congress could require or even allow state courts to hear federal criminal cases on principles of the law of nations thought to inhere in the constitutional structure.[138]

Today, historical arguments that Congress lacks power to regulate state court jurisdiction in state law cases might well identify incidents of sovereignty defined by the law of nations and argued by members of the Founding generation to limit congressional power. Counterarguments might well reject such principles in favor of a process-based theory of American federalism—one that views "procedural" or "political safeguards of federalism" as the primary, if not exclusive, check on federal power relative to state power.[139] Framed this way, the issue whether Congress has authority to enact choice-of-forum laws for state courts in state law cases would depend on commitments to the balance of federal and state power, not the relative interests of states and individuals in the practice of abortion. Regardless of the merits of these positions, normative claims about federalism would more likely drive the Court's analysis than normative claims about the relative interests of a state in regulating women in procuring abortions. In other words, the constitutional analysis of congressional power to provide a choice-of-forum rule to umpire state authority over abortion would most likely be non-abortion-dependent.

### *C. Summary*

The foregoing analysis demonstrates the possibility, if not the likelihood, that the Court would address most questions of federal authority to regulate abortion in a post-*Roe* world under rules or standards that are not abortion-dependent. The Court likely would resolve questions of congressional power to regulate abortion directly under the "substantial effects" test—a test concerned with the relationship between a regulated activity and commerce—not with whether state regulation of abortion is inherently justified. As for congressional regulation of state regulation of abortion, it is more difficult to identify the "test" the Court would invoke. It seems safe to say, however, at least that the Court would review federal choice-of-forum rules in abortion cases under familiar Commerce Clause and state sovereignty paradigms—paradigms that in terms implicate normative commitments to congressional

137. *See generally* Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949 (2006) (describing issues of congressional power and state court jurisdiction that were discussed during the Founding period and subsequent decades, and the general law principles that animated the discussions).

138. *See id.* at 966–90 (describing such arguments).

139. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

and state power, not the relative interests of government and individuals in the practice of abortion.

## III. FEDERALISM DOCTRINES AND REGULATORY OUTCOMES

As Parts I and II demonstrate, it is possible that, in a post-*Roe* world, abortion-dependent standards would govern most questions of state power to regulate abortion while non-abortion-dependent standards would govern most questions of federal power to regulate abortion. Accordingly, the extent to which the controversial balancing of *Roe* and *Casey* would endure if the Court overruled those cases could depend on which political institutions sought to regulate abortion and how.

It is interesting to ponder why state authority to regulate abortion might well implicate abortion-dependent standards while federal authority to regulate abortion might well implicate non-abortion-dependent standards. Though a full exploration of this question is beyond the scope of this Essay, it is at least worth observing the differing roles the Court has identified for itself in assessing the regulatory authority of states and the federal government.

In determining state authority to regulate relative to other states, the Court has long deemed some degree of "umpiring" discretion necessary. Consider the standard that a plurality articulated in *Allstate Insurance Co. v. Hague*[140] (and the Court adopted in *Phillips Petroleum Co. v. Shutts*[141]) for determining when, consistent with the Due Process and Full Faith and Credit Clauses, a state may enforce its own laws: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[142] Implicit in this standard is the idea that, for any given set of facts generating a lawsuit, the laws of more than one state may constitutionally apply.[143] The Court has acknowledged—even embraced—the degree of discretion that such an interest-balancing standard contemplates for courts. In determining whether any given state has "power" to apply its own laws to a given dispute relative to the power

140. 449 U.S. 302 (1981).

141. 472 U.S. 797 (1985).

142. *Allstate*, 449 U.S. at 312–13 (plurality opinion); *see Shutts*, 472 U.S. at 818 (invoking and applying the *Allstate* standard as the governing standard).

143. *See Allstate*, 449 U.S. at 307 ("Implicit in this inquiry is the recognition, long accepted by this Court, that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction."); *see also Shutts*, 472 U.S. at 823 ("[W]e reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law.").

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of another state,[144] the Court in *Alaska Packers Association v. Industrial Accident Commission*[145] found it "unavoidable" that a court "determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another."[146] To make that determination, a court must "apprais[e] the governmental interests of each jurisdiction, and turn[] the scale of decision according to their weight."[147]

The same could largely be said of the Court's "negative" Commerce Clause jurisprudence. To determine whether a state regulation impermissibly burdens interstate commerce (and thus out-of-state interests), the Court has embraced an open-ended, case-by-case analysis of state interests. In *West Lynn Creamery v. Healy*,[148] the Court explained its Dormant "Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather [its] cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects."[149] In this context, Justice Thomas has argued:

> Any test that requires us to assess (1) whether a particular statute serves a "legitimate" local public interest; (2) whether the effects of the statute on interstate commerce are merely "incidental" or "clearly excessive in relation to the putative benefits"; (3) the "nature" of the local interest; and (4) whether there are alternative means of furthering the local interest that have a "lesser impact" on interstate commerce, and even then makes the question "one of degree," surely invites us, if not compels us, to function more as legislators than as judges.[150]

It is perhaps unsurprising that those Justices who strongly eschew such discretionary balancing tests—Justice Thomas and Justice Scalia—have rejected an open-ended "negative" Commerce Clause and otherwise determined state regulatory authority relative to other states under more categorical tests.[151]

144. Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930) (holding that Texas was "without power" to affect an insurance contract when "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas").

145. 294 U.S. 533 (1935).

146. *Id.* at 547.

147. *Id.*

148. 512 U.S. 186 (1994).

149. *Id.* at 201.

150. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 619 (1997) (Thomas, J. dissenting).

151. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990) (reasoning, in the plurality opinion by Justice Scalia, that a state may exercise personal jurisdiction over a person present in the court's territorial jurisdiction under long-established, categorical practice); Sun Oil v. Wortman, 486 U.S. 717 (1988) (reasoning, in an opinion by Justice Scalia, that a state may apply its own statute of limitations to claims otherwise governed by the law of another state under long-established, categorical choice-of-law practices). *See generally* Antonin Scalia, *The Rule of Law*

Contrast questions of federal authority to regulate, for which the Court recently has eschewed tests calling for discretionary determinations of governmental "interests" in the particular subject-matter of a dispute. To determine whether Congress has regulated "commerce" under its Article I powers, the Court has employed the "substantial effects" test: Congress may "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[152] Though critics have charged that this test is malleable and expansive, the test, by its terms, does not call upon a court to determine the nature and strength of *any* inherent federal interest in regulating a particular activity. Rather, the test calls upon the court to determine how a regulated activity relates to interstate commerce. Thus, though the test appears to give wide berth to courts in classifying activities as "economic" or aggregating a relevant "class of activities," the ultimate inquiry is how regulated activity relates to commerce, not what inherent interest Congress may have in regulating the activity.

In determining the scope of federal power, not only has the Court not assessed inherent federal interests in regulating a given activity; it has generally rejected a test that would limit federal power according to whether there exist inherent state interests in regulating that activity. In *National League of Cities v. Usery*,[153] the Court struck down a federal statute regulating wages and hours of state employees on the ground that it would "impermissibly interfere with the integral governmental functions" of states.[154] Nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[155] the Court overruled *Usery*, rejecting the "traditional state functions" test. The Court provided two main reasons for refusing to limit federal power based on the existence of a "traditional" or "integral" state interest in the regulated activities.[156] First, it found the test "unworkable" in practice.[157] The Court found it "difficult, if not impossible, to identify an organizing principle" rendering certain state functions integral and others not so.[158] Second, the Court found that no test that "purports to separate out important governmental functions" for purposes of defining federal regulatory power "can be faithful to the role of federalism in a democratic society."[159] "Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental

*as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing for "general rules" rather than "personal discretion" in judicial decision-making).

152. Gonzales v. Raich, 545 U.S. 1, 17 (2005).

153. 426 U.S. 833 (1976).

154. *Id.* at 851.

155. 469 U.S. 528 (1985).

156. *Id.* at 546.

157. *Id.*

158. *Id.* at 539.

159. *Id.* at 546.

functions," the Court found, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[160] Accordingly, the Court rejected any limitation on federal regulatory power based on a state's "integral" or "traditional" interest in regulating a given area in favor of a process-based theory of federalism. Under *Garcia*'s process-based theory, the political safeguards of federalism inherent in the federal lawmaking procedures that the Constitution provides are generally sufficient to protect the interests of the states under the American constitutional structure.[161]

Of course, the Court has not fully embraced procedural and political safeguards as the sole safeguards of state interests and autonomy under the American Constitution. In *New York* and *Printz*, the Court held that Congress may not commandeer state legislatures and executive officials to enact or enforce federal law.[162] In *Seminole Tribe* and *Alden*, the Court held that Congress lacks power to subject states to suit in federal or state court based on principles of state sovereign immunity.[163] Indeed, in *United States v. Lopez*[164] and *United States v. Morrison*,[165] cases in which the Court held that certain congressional regulations of guns near schools and acts of sexual violence against women were beyond the commerce power, the Court noted that the respective regulations were in areas that states traditionally regulated. In *Lopez*, the Court explained that if Congress could regulate guns near schools, it could, by extension, generally regulate "areas such as criminal law enforcement or education where States historically have been sovereign."[166] Similarly, in *Morrison*, the Court explained that "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[167]

Even if one reads these cases as embracing concepts of "traditional state functions" (notwithstanding *Garcia*), none assessed the propriety of federal regulation as being based on *a state's interest in a particular regulatory outcome*. Rather, in each case, the touchstone of the Court's reasoning was that Congress had violated a federalism principle transcending state or federal interests in particular regulatory outcomes. In the anti-commandeering and sovereign immunity cases, the Court held categorically that Congress may not

160. *Garcia*, 469 U.S. at 546.

161. *Id.* at 544–53 (assessing "[t]he effectiveness of the federal political process in preserving the States' interests" under the constitutional structure).

162. *See supra* notes 128–31 and accompanying text.

163. *See supra* notes 135–36 and accompanying text.

164. 514 U.S. 549 (1995).

165. 529 U.S. 598 (2000).

166. *Lopez*, 514 U.S. at 564.

167. *Morrison*, 529 U.S. at 618.

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require states to enact or enforce *any* federal regulatory program or authorize *any* private action against a state unless a provision of the Constitution expressly authorizes Congress to do so. In the Commerce Clause cases, the Court assessed whether Congress was regulating a sufficiently "economic" activity that "substantially affected" commerce. The point in explaining that Congress was regulating in an area that states traditionally regulated was that states have a prerogative to regulate as they wish, not that any state had demonstrated a sufficiently strong interest in regulating as it had.

Therein lies the difference between how the Court might well assess questions of federal constitutional power to regulate abortion and state constitutional power to regulate abortion. In assessing questions of state power to regulate abortion, the doctrines available to the Court may well lead it to assess a state's interest in regulating abortion in a particular way. As Professor Fallon points out, a general conflict-of-laws "interest analysis" might lead a court to assess the strength of a state's interest in regulating abortion as the state has regulated it.[168] In assessing questions of congressional power under the Commerce Clause, on the other hand, the Court has asked whether Congress has power relative to principles that transcend federal and state interests in particular regulatory outcomes.

The relevance of these observations to the question of what the judicial role would be in cases relating to abortion in a post-*Roe* world is evident. In cases involving state regulation of abortion, governing standards (and the Court's self-identified role in applying those standards) could enable the Court to make assessments regarding a state's inherent interest in regulating the practice of abortion in particular ways. In cases involving federal regulation of abortion, governing standards (and the Court's self-identified role in applying those standards) could limit the Court to assessing relative federal and state power according to positive markers unrelated to the inherent interest of any government in regulating abortion in a particular way.

## CONCLUSION

Professor Fallon is surely correct that, were the Court to overrule *Roe v. Wade*, political actors within the federal system could take regulatory actions that would generate constitutional questions relating to abortion.[169] This Essay merely proposes a refinement on that analysis. Under current federalism doctrines, questions relating to state power to regulate abortion may well involve assessments of the legitimacy of state interests in regulating abortion in particular ways. On the other hand, questions relating to federal power to regulate abortion might well involve assessments of the balance of federal and state power based on interests that transcend the perceived worth of particular

168. *See supra* notes 23–24 and accompanying text.

169. Fallon, *supra* note 1, at 612–14.

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regulatory outcomes. Thus, whether post-*Roe* courts would remain involved in deciding questions of the legitimacy of governmental interests in regulating abortion in particular ways may well depend on the kind of governmental regulation that emerged in a post-*Roe* world.